

## 10. Global and Regional Anticorruption Frameworks

10. Develop to the widest extent possible international cooperation in all areas of the fight against corruption.

12. Encourage activities of regional and other multilateral organizations in anticorruption efforts.

### Alan P. Larson, Moderator Assistant Secretary of State for Economic and Business Affairs United States

The Specialty Session on Global and Regional Anticorruption Frameworks met at the Department of State.

The purpose of this session was to review key global anticorruption instruments, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (contained in the Source Book of the Global Forum), and regional initiatives, including the Inter-American Convention Against Corruption (contained in the Source Book of the Global Forum) and proposals for activities in Africa and Asia.

Following individual presentations by members of the discussion panel, the group further discussed the merits of global versus regional approaches. The lack of an international mechanism was an obstacle to enforcement. There appeared to be consensus that progress at all levels -- international, regional and national -- was critical to success.

### Prof. Dr. Mark Pieth University of Basel Switzerland

The full text of Dr. Pieth's paper "International Efforts to Combat Corruption" may be found in the Appendix.

Dr. Pieth said that Europeans had long wondered why the United States had been so persistently seeking to internationalize the Foreign Corrupt Practices Act (FCPA). This was seen as either an act of moralism, or acceptance of a short-term disadvantage to gain a long-term competitive

advantage by forcing companies to win contracts without bribes. Until 1994, Europe was entirely concerned that a more or less hidden trade agenda prompted this policy.

With globalization of the world economy, however, corruption abroad became more evident to Europeans, who also now perceived corruption as creating irrational trade barriers that negatively affected their own trade opportunities. This worldwide change of perception, especially in industrialized countries, was essential for the current broadening of the international coalition against corruption, including international organizations, governments, multilateral development banks, the business community, trade unions and non-governmental organizations. There was dramatic development of intergovernmental programs and standards during the second half of the nineties. All European countries

10.4 Inclusion of provisions on combating corruption in appropriate bilateral and multilateral instruments.

were in the process of preparing legislation to ratify and implement between two and six instruments against corruption: the OECD Recommendation and Convention of 1997; the Council of Europe Convention of 1998; and for members of the European Union, the four Treaties and Protocols of the EU on the protection of financial interests of the community. The question now was how to coordinate this quantity of prescriptive material: do concepts fit together, or will they lead to competitive action by agencies and legal chaos?

The speaker would concentrate in this presentation on instruments of the OECD, the Council of Europe and the European Union, and mention initiatives in the Organization of American States and United Nations. He would not address in detail very essential work also done by the multilateral development banks and the International Chamber of Commerce.

The OECD instruments, the "Revised Recommendation" of May 1997 and the Convention of November 1997, have a narrow objective and limited goals. They are oriented to the supply side of bribery, intending to reduce corrupt payments into foreign, predominantly developing or emerging, markets by sanctioning those who give or offer bribes and their accomplices, as well as by prescribing preventative measures. The behavior of foreign officials that accept bribes is not addressed by the OECD. This concept is clearly influenced by the United States approach since 1977, but does not merely replicate the FCPA. However, importantly, it creates an international process with follow-up mechanisms and outreach capability.

Since the European Union itself has no powers to directly enact criminal law, the issue of corruption is approached through international treaties that are ratified and implemented nationally. The "First Protocol" of 1996 addresses criminalization of transnational bribery within the EU that endangers the community's economic interests. The 1997 Convention on Bribery (contained in

the Source Book of the Global Forum) moves one step further by eliminating the requirement of endangering the community's interests. The European Commission is also seeking to develop supranational law against corruption in the context of community law based on competence outside criminal law, such as the tax treatment of bribes and rules on accounting and auditing. Significantly, the EU is also moving to regulate commercial corruption involving only private parties. These steps within the EU are limited in geographic scope, and may be seen as steps on the way to supranationality.

The purpose of the Council of Europe is to address legal harmonization and protection of human rights, and in particular to foster the legal integration of Eastern Europe. Its Heads of State adopted twenty "Guiding Principles" in October 1997. The Council of Europe has also prepared a Criminal Law Convention on Corruption, which was adopted by the Committee of Ministers in November 1998. This differs from other initiatives in that it adopts a very broad approach to corruption, requiring the criminalization of both giving or offer ("active") and solicitation or receipt ("passive") bribery, and trading in influence, domestically and internationally, of all sorts of officials and commercial bribery of private persons. This links with previous work by the Council of Europe on mutual legal assistance and extradition, as well as more recent work on money laundering and confiscation of assets. Both the Council of Europe and the EU have developed elaborate follow-up mechanisms.

The aims of the OAS Inter-American Convention Against Corruption are close to those of the Council of Europe, but its methods are somewhat different. This does not yet have a follow-up mechanism, although the OAS is developing more comprehensive action against corruption, including non-criminal measures. The United Nations approved two General Assembly resolutions on corruption in 1996 (contained in the Source Book of the Global Forum), and is initiating work on use of offshore financial centers in connection with corruption.

The speaker then discussed several key issues of criminal law relating to the criminalization of transnational bribery, including the methodology employed in criminalization obligations, definition of public officials and broader issues in the definition of the offense of bribery, the responsibility of legal persons and sanctions against companies, issues of jurisdiction, enforcement, money laundering and accounting offenses. It was important to realize that none of these organizations is interested in sending as many managers to prison as possible. Rather, they desired to motivate a change in attitude and to introduce sound internal rules and controls down to operational level to prevent acts of bribery and corruption from taking place.

Judge William H. Heath  
Head, Heath Special Investigating Unit  
South Africa

The full text of Judge Heath's prepared presentation "Corruption in Africa: A South African Perspective" may be found in the Appendix.

Judge Heath said that in South Africa, corruption is treated on a much wider basis than just bribery of an official. It includes maladministration and mismanagement. Corruption is rife in South Africa, but other African countries faced larger problems.

Probably the most typical example of corruption in Africa is bribery of state officials. This has led to economic hardship for many African countries, and to lack of substantial investment and development. Failure to control corruption has also contributed to turmoil in many so-called "democratic" African countries.

There are serious problems with the criminal justice system in South Africa, causing many to lose confidence in the system and fail to inform authorities of corruption. In many cases, this results from lack of experience on the part of people involved in the criminal justice system, which allows criminals to escape prosecution. There is a particular serious problem of corruption among police. This led to the recent establishment of the Special Anti-Corruption Unit, which has already had substantial success. A recent change in prosecuting procedures now affords leadership to a National Prosecuting Authority, but this novel concept has not yet had opportunity to prove itself.

7.3 Establishment of an independent mechanism within judicial and security agencies with the duty to investigate corruption allegations, and with the power to compel statements and obtain documents from all agency personnel.

In addition to criminal prosecution, the South African Government has established two bodies for the recovery and protection of state assets, a Special Tribunal and a Special Investigating Unit for investigating corruption, fraud and maladministration. This differs from criminal prosecution; after investigation, the Special Investigative Unit pursues civil litigation before the Special Tribunal to

7.5 Systems that allow for the appointment, where appropriate, of special authorities or commissions to handle or oversee corruption investigations and prosecutions.

stop loss of state assets or recover them, greatly expediting this process. The Special Investigative Unit may require all public or private parties to provide documents or appear to

testify, and has the power of search and seizure. The Unit consists of experts in various fields including forensic auditors, accountants, investigators, and a sophisticated computer system. The Head of the Unit is authorized to appoint experts in any field necessary to an investigation. During 1998, this Unit recovered or protected assets to the value of over 840 million Rand, and has cases being investigated to the value of over nine billion Rand.

Jorge Garcia Gonzalez  
Organization of American States

Mr. Gonzalez discussed progress in meaningful implementation of the Inter-American Convention Against Corruption by the Organization of American States. He discussed this with specific reference to addressing corrupt business practices in the Western Hemisphere.

Guy de Vel  
Director of Legal Affairs  
Council of Europe

The text of Mr. de Vel's prepared speaking notes for his presentation may be found in the Appendix.

Mr. de Vel described the Council of Europe and its activities to promote democracy, the rule of law, individual rights and freedoms, and social progress. Since the end of the Cold War, the Council of Europe has become a truly paneuropean organization.

In the 1990's, countries in all parts of Europe and the world were shaken by huge corruption scandals. Corruption is a subject well suited for international cooperation, as it is shared by most if not all Council of Europe member states, and most serious forms of corruption contain transnational elements. Efforts by the Council of Europe against corruption had considerable political impetus as one of the highest priorities for the organization and its member states. These efforts were multidisciplinary. All were linked with the monitoring mechanism provided by the agreement known as GRECO, the Group of States Against Corruption, which has been modeled on mutual evaluation methods employed by the Financial Action Task Force. The Council of Europe seeks to address all forms of corrupt behavior, with a full range of international law measures against corruption. Countries could chose to accept instruments appropriate to their circumstances, with the GRECO monitoring mechanism applying flexibly to all.

The speaker described the origin and content of the "20 Guiding Principles for the Fight Against Corruption" (contained in the Source Book of the Global Forum), the agreement establishing the GRECO, and the Criminal Law Convention on Corruption (contained in the Source Book of the Global Forum). He also described the draft civil law convention on corruption, which is in preparation, and the Model Code of Conduct for Public Officials, which it was hoped would be complete during the present year.

Ramon Cardenas  
Senior Deputy Executive Secretary  
Office of the President  
Philippines

Mr. Cardenas emphasized the importance of political will and concrete action in the Philippines' approach to corruption issues.

Andrew J. Pincus  
General Counsel  
Department of Commerce  
United States

The full text of Mr. Pincus' remarks, as prepared for delivery, may be found in the Appendix.

Mr. Pincus said that before the United States law banning foreign bribery, investigations by the United States Securities and Exchange Commission in the mid-1970's revealed that over 400 United States companies admitted to making questionable or illegal payments in excess of \$300 million to foreign government officials, politicians or political parties. Scandals in Japan, Italy and Mexico damaged the reputation of American companies throughout the world, and led to enactment of the Foreign Corrupt Practices Act of 1977. This requires all United States business entities and citizens to refrain from making any unlawful payments to foreign public officials, political parties, party officials, or candidates for public office for the purpose of obtaining or retaining business.

After passage of the FCPA, United States companies complained of disadvantage when foreign competitors were able to offer bribes. The United States was gratified that criminalization of bribery of foreign public officials is now embodied in a global convention sponsored by the OECD and signed by 34 of the world's major exporting nations.

Monitoring implementation of the OECD Convention was one of the highest priorities of the United States. The United States would urge that the OECD Secretariat be provided with resources sufficient to support the Working Group on Bribery to carry out monitoring activities.

To implement the OECD Convention, the United States has amended its law to include officials of international agencies in its definition of foreign public official, eliminate disparities between penalties imposed on United States nationals and non-national employees or agents, to cover all foreign natural and

legal persons while in United States territory, and to prohibit bribes made for the purpose of securing "any improper advantage", as required by the Convention.

In order not to lose momentum, it is necessary to follow the Convention by continuing to address outstanding issues, such as bribes to political parties, candidates or party officials. Many signatories had not yet completed ratification and passage of implementing legislation. Several OECD member countries still allow tax deduction for bribes paid to foreign officials.

The United States would also be pursuing other anticorruption efforts. The OAS Convention is an important vehicle, and the Secretary of Commerce has given priority to working with the private sector and the United States Senate to promote understanding of it. The United States applauds the initiative of the members of the Council of Europe for its Criminal Law Convention. The United States is working closely with the private sector on an agenda in the Asia-Pacific Economic Cooperation Forum (APEC) that will address bribery, corruption and transparency. The United States hoped to conclude an agreement on transparency in government procurement in the World Trade Organization during the present year. The United States fully supports the initiative of the Global Coalition for Africa and 11 African countries in cooperation with the World Bank to promote a possible African anticorruption agreement.

The Commercial Law Development Program is an initiative of the United States Department of Commerce, Office of the General Counsel, funded in part by the U.S. Agency for International Development. It provides "rule of law" training and consultative services for lawmakers, regulators, judges, lawyers and educators seeking assistance in the evaluation, revision and implementation of evolving legal systems. In the area of corruption, this program assists foreign governments to address such areas as government procurement, reform of the judiciary, government ethics issues, transparency and regulatory reform.

